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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-356

JOSEPH L. GORDON,

Petitioner,

v.

JAMES K. ADCOCK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on March 30, 1971.

OPINIONS BELOW

The Order of Dismissal of the District Court for the Northern District of California, dated August 4, 1969, is appended to this petition in the Appendix at p. 9.

The opinion of the Court of Appeals for the Ninth Circuit, dated March 30, 1971, is also appended hereto in the Appendix at pp. 10-11.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on March 30, 1971 and copies thereof are appended to this petition in the Appendix at pp. 10-11. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Where petitioner has sued respondent for libel on the ground that respondent made a false, defamatory and malicious statement against him in response to a Civil Service Commission inquiry regarding petitioner's fitness for employment, and the respondent has defended on the ground of absolute privilege under *Barr v. Matteo*, 360 U.S. 564, the following questions arise:

1. Whether a response is mandatory by an officer in the Armed Forces to an inquiry by the U.S. Civil Service Commission in regard to the qualifications of an applicant for Federal employment?

2. If the response is not mandatory, is the respondent in making such libelous response, still considered acting within the "outer perimeter of his line of duty" and thus protected by *Barr v. Matteo*.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

28 U.S.C. 1442a; 5 U.S.C. 3301; Executive Order 10577.

STATEMENT

This is an action for libel brought by Lt. Colonel Joseph L. Gordon (Ret.) USAF, against Col. James K. Adcock (Ret.) USAF, his former superior officer. It was filed on November 27, 1968, in the Superior Court of the State of California in and for the County of Santa Clara and removed to the U.S. District Court pursuant to 28 U.S.C. 1442a. Gordon alleged, that after applying for Federal employment, after his retirement in January 1964, the Civil Service Commission in its investigation of his qualifications addressed an inquiry to Adcock, and that in response, Adcock wrote the following:

> He is slow and lethargic; shows little initiative; does just enough to get by; especially inept at oral presentation. I wouldn't employ this individual in any job under any circumstances. He was protected by the Air Force retirement system long enough and should not be permitted to free-load on the government any longer. I "carried" this officer for about 3 years as he neared retirement from the Air Force. He didn't earn his salary and was a sad excuse for an Air Force Officer. It will be a shame if he is now permitted to free-load on Civil Service.

Gordon went on to state in his complaint that the foregoing statement was made by Adcock:

> With knowledge of their falsity, without any cause whatsoever to believe them to be true, and were made and published by defendant with actual malice and with intent ot prevent plaintiff from obtaining gainful or any employment in the federal service . . . and . . . as a direct and proximate result, plaintiff was unable for a long period of time to obtain gov-

> ernment employment . . . and when eventually he did obtain employment with the federal government, he was employed in a position and at a salary grade substantially lower than that in which he would have been employed in the absence of the said false and defamatory statements by defendant . . .

Adcock thereafter moved to dismiss or in the alternate sought summary judgment. He argued that the allegedly libelous statement was absolutely privileged under *Barr v. Matteo*, 360 U.S. 564 because the statement was made in the course of his discretionary duties as an Air Force officer and his response to the Civil Service inquiry was affirmatively required by Executive Order 10577, Sec. 5.3. Said Section in said Executive Order provides as follows:

> Sec. 5.3. Officers and employees to furnish testimony. All officers and employees in the executive branch, and applicants or eligibles for positions therein, shall give to the Commission or its authorized representatives all information and testimony in regard to matters inquired of arising under the laws, rules and regulations administered by the Commission.

Gordon countered by denying that Adcock was required to respond to the inquiry under said Executive Order, arguing that the "Officers and employees" referred to, were only those in the competitive Civil Service, and that even those in the "excepted service," let alone military personnel, were exempted from its position:

> Sec. 1.1. Positions and employees affected by these Rules. These Rules shall apply to all positions in the *competitive service* and to all incumbents of such positions. Except as expressly provided in the Rule concerned, these Rules shall not apply to positions and employees in the *excepted service*. (Emphasis added.)

In addition Gordon attached to his reply affidavit, six exhibits consisting of 5 "USAF Officer Effectiveness Reports" covering the period of February 1958 through June of 1962 in which he was invariably characterized as either "A

very fine Officer" or having "Effectiveness well above most officers." One of these "Effectiveness Reports" was indorsed by his then "Indorsing Official," in signature, by "James K. Adcock, Lt. Colonel 20589A, Directorate of Admin. Sys., Hq. USAF; Chief, Postal & Security Courier saying "I have had frequent personal contact with this officer and agree with the evaluation." The sixth exhibit was a Special Order dated 20 December 1963, awarding the "Air Force Commendation Medal" to Gordon "for meritorious service or achievement during . . . October 1960 to December 1963."

However, by order dated August 4, 1969 (App. p. 9), the District Court, without giving reasons, dismissed the complaint and action. Gordon appealed on August 16, 1969, and after briefs submitted by both parties, the Court of Appeals for the Ninth Circuit affirmed, on March 30, 1971.

REASONS FOR GRANTING THE WRIT

The reasons for granting the writ are respectfully submitted as follows:

1. There was no mandatory requirement for Adcock to respond to the inquiry from Civil Service.

2. That Adcock went beyond the scope of his official business and the outer perimeter of his line of duty.

1. There was no mandatory requirement for Adcock to respond to the inquiry from Civil Service.

a. It is utterly clear that Sec. 5.3 of Executive Order 10577, supra, gave no authority to the Civil Service Commission to enforce a resonse from Adcock. The "officers and employees in the executive branch" to which it referred, were those "officers and employees" of the competitive Federal Civil Service, as set out in Sec. 1.1 of the same Executive Order, supra. Adcock being in the military service would have had to answer to no one if he had refused to respond. However, he utilized the confidentiality of this communication to wreak his overweening spleen upon Gordon, in a totally false and defamatory manner.

2. Adcock went beyond the scope of his official business and the outer perimeter of his line of duty.

a. Adcock's business was that of being a Lt. Colonel in the U.S. Air Force. Any inquiry to him from the Civil Service Commission, concerning the qualifications of Gordon, as we have suggested above, did not have to be answered under any law or regulation. The question then presents itself as to whether it was within Adcock's scope of his official business and the outer perimeter of his line of duty to answer.

Mr. Justice Black in concurring in separate opinion with the *Barr v. Matteo* decision, supra, stated that:

> There is some indication in the record that there was an affirmative duty on Mr. Barr to give press releases like this, ... It is also clear that the subject matter discussed in the release was germane to the proper functioning of the Rent Stabilization Agency and Mr. Barr's duties in relation to it.

That, we suggest, is a far cry from the situation with Adcock. Adcock's failure to answer the inquiry from Civil Service had absolutely nothing to do with the proper functioning of the U.S. Air Force—and Adcock's functions were geared to the functioning of the U.S. Air Force not Civil Service.

Mr. Justice Harlan, who wrote the majority opinion of *Barr v. Matteo*, indicated there that the "The question is a close one. . . ."; and in that case the equities on the side of Barr were far more weighty than the zero weight that sits on the scale of justice for Adcock. Justice Harlan in expanding his theme stated in addition to the above,

> . . . but we cannot say that it was not an appropriate exercise of the discretion with which an executive officer of petitioner's rank is necessarily clothed to publish the press release here at issue in the circumstances disclosed by this record.

In the *Barr* case, Mr. Barr was almost compelled to do what he did in order to bring to public light matters and things which his respondents had used against him; both the

welfare of the community as well as his own reputation could well have suffered, if he had not done what he did.

In *Urbina v. Gilfilen*, 411 F.2d 546 (9th Cir. 1969) cited by the Court of Appeals in its opinion, there was hardly a comparison to this case. There, a fellow employee was charged by Urbina with having given a false affidavit as a witness against her in a removal action initiated by her agency. The Court held that Gilfilen was well within the "Outer Perimeter of his Duty" when he did the same. This is a far cry from the instant case.

In *Sulger v. Pochyla*, 397 F.2d 173 (9th Cir. 1968), also cited by the Appeals Court as granting immunity to a commanding general and his staff judge advocate, both military men, there is no relationship to the fact that the Civil Service communique should also grant immunity to Adcock, as a military man. In the Pochyla case, the latter a commanding general, was granted absolute immunity because the matter in controversy concerned the welfare of his men and his post. This is not the case here.

The fact of the matter is, that Adcock and his ilk, in the future could well take the initiative, rather than wait for an inquiry, and kill off those people whom they just didn't like by volunteering free but poisonous information.

In the case of *West v. Garrett*, 392 F.2d 543 (5 Cir. 1968) where a couple of employees submitted a complaint against a third employee in the Government because the third was causing strained relations, the court held that such complaint was well with "the outer perimeter" of their line of duty. Again that is very far removed from the circumstances of this case.

In the case of *Bershad v. Wood*, 290 F.2d 714 (9 Cir. 1961), there the Internal Revenue Officers were involved in levying on a bank deposit for I.R. taxes, and certainly performing a task well within the "outer perimeter" of duty.

In the case of *Gregoire v. Biddle*, 177 F.2d 579 (2 Cir. 1949), cert. den. 339 U.S. 949 (1950). In this case the

language used by Judge Learned Hand was to some extent incorporated in *Barr v. Matteo*. In *Gregoire*. This case is most important because there the Court said:

> The decisions have indeed always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and *hence that to exercise a power dishonestly* is necessarily to overstep its bounds.

CONCLUSION

For all of the foregoing reasons, this Honorable Court should grant petitioner a writ of certiorari to the Court of Appeals for the 9th Circuit.

Respectfully submitted,

Samuel I. Sherwood
501 13th Street, N.W.
Washington, D.C. 20004

Attorney for Petitioner

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FILED
AUG - 4 1969
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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSEPH L. GORDON,

Plaintiff,

v.

JAMES K. ADCOCK,

Defendant.

CIVIL NO. 50583

ORDER OF DISMISSAL

This matter came regularly on before the Court on defendant's motion to dismiss or in the alternative for summary judgment.

The matter was fully briefed, argued, and submitted.

Thereafter, the Court, having given full consideration to all of the documents submitted by the parties and to the arguments of counsel, determined that the motion to dismiss should be granted and entered a minute order to that effect on July 10, 1969.

Accordingly,

IT IS HEREBY ORDERED that the complaint and action be and hereby are dismissed in their entirety.

Dated: ~~July~~ ____, 1969

AUG - 4 1969

ROBERT F. PECKHAM

UNITED STATES DISTRICT JUDGE

APPENDIX

JOSEPH L. GORDON,
Plaintiff-Appellant,
v.
JAMES K. ADCOCK,
Defendant-Appellee.
No. 24,766

Appeal from the United States District Court
for the Northern District of California

Before: CARTER, WRIGHT and TRASK, Circuit Judges.

PER CURIAM:

Gordon's action for libel in state court was removed to the district court pursuant to 28 U.S.C. § 1442(a), where it was dismissed. Action was based on a written statement made by Adcock, an officer in the United States Air Force, to the Civil Service Commission. Gordon appeals and we affirm.

Gordon, a retired Air Force officer, applied to the Civil Service Commission for federal employment in January 1964. In the course of its investigation of his qualifications, the Commission addressed an inquiry to Lieutenant Colonel James K. Adcock, then on active duty in Germany, who had, for several years, been Gordon's superior officer.

The Commission's form letter said in part:

> "As one who is familiar with the applicant, we earnestly request your frank and objective evaluation of his qualifications. The information you furnish will be kept in confidence and will be made available only to Civil Service examiners and agency appointing officers."

Adcock's confidential response was not a recommendation of his former subordinate officer but rather characterized him as "slow and lethargic; shows little initiative; does just enough to get by . . . . I wouldn't employ this individual in any job under any circumstances."

Under *Barr v. Matteo*, 360 U.S. 564 (1959), government employees have an absolute immunity against suits for damages based on libel and slander for actions taken by them "within the outer perimeter" of their line of duty "despite the allegations of malice in the complaint." 360 U.S. at 575. The government employee in *Barr* was Acting Director of the Office of Rent Stabilization. We have applied the rule of that case to a civilian employee of the United States Air Force, *Urbina v. Gilfilen*, 411 F.2d 546 (9th Cir. 1969), and to the commanding general of an Army post and his staff judge advocate, *Sulger v. Pochyla*, 397 F.2d 173 (9th Cir. 1968).

The letter from the Commission requesting a "frank and objective evaluation" of Gordon's fitness for employment was manifestly proper to the carrying out of the Commission's duties. 5 U.S.C. § 3301. Hence, Adcock's response, which was nothing more than his personal evaluation, was clearly protected by the privilege.

We need not consider the alternate ground for upholding the decision of the district court that the action was barred by the statute of limitations.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-356

JOSEPH L. GORDON, PETITIONER

v.

JAMES K. ADCOCK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

We invite the Court's attention to the following facts, which demonstrate that the petition for a writ of certiorari was filed out of time. The judgment of the court of appeals was entered on March 30, 1971. The time for filing a petition for a writ of certiorari was not extended, and, accordingly, the 90-day period provided by 28 U.S.C. 2101(c) for petitioning in civil cases expired on June 28, 1971. The petition was filed on June 29, 1971.

Since the time limit contained in 28 U.S.C. 2101 (c) is jurisdictional, see *Department of Banking* v. *Pink*, 317 U.S. 264, 268, the petition should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1971.

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REPLY MEMORANDUM TO RESPONDENT'S MEMORANDUM IN OPPOSITION

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IN THE

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Respondent.

REPLY MEMORANDUM TO RESPONDENT'S MEMORANDUM IN OPPOSITION

The Petitioner prays that his petition be not denied on the ground that it was filed out of time. Petitioner earnestly pleads to the Court that the filing error was purely that, a totally innocent and inadvertent error. It was inadvertently assumed that March 30th was the last day of the month. It was believed that the last filing day was June 30, 1971, three months later—that the 90 days limit and 3 months were equally equated.

Pursuant thereto, the draft of the brief was in the hands of the printer on June 28, with filing to be made on June 30th. Proofs were examined on the morning of the 29th of June. However while on the way to lunch on the same day, the realization of the error struck counsel, and he immediately communicated with the printer. Thereafter, counsel spent the greater part of the afternoon of the 29th with the printer and sometime after 4 p.m. raced to the Supreme Court for filing. In support thereof counsel has appended affidavits of two employees of the printer, at appendix, p. 1a-2a.

That equating 90 days with three months is a natural reaction, we call attention of the Court to the respondent's own citation of *Department of Banking v. Pink*, 317 U.S. 264, 268. There too the Court used the measure of three months rather than 90 days when it said:

> "Where the order of judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for the purposes of review is established."

Furthermore, this Honorable Court has shown a disposition to construe the statute of Title 28, Section 2101(c), with liberality and leniency. In the case of *Union National Bank of Wichita Kansas v. Lamb*, (Mo. 1949), 69 S.Ct. 911, 337 U.S. 38, 93 L.Ed. 1190, the petition was filed on the 91st day, the 90th day falling on a Sunday. There the Court held that

> "Rule 6(a) of the Federal Rules of Civil Procedure, provides that where the last day for performance of an act falls on a Sunday or legal holiday, performance on the next day which is not a Sunday or a legal holiday is timely. That rule provides the method of computation of time prescribed or allowed not only by the rules or by order of the court, but by any other applicable statute. Since the rule had the concurrence of Congress, and since no contrary policy is

> expressed in this statute governing this review, we think that the considerations of liberality and leniency which find expression in Rule 6(a) are equally applicable in 28 U.S.C. 2101(c)."

Now the petitioners in the *Union National Bank* case, supra, could have filed their petition on Saturday or the 89th day. Evidently they too were inadvertent, but luckily they were permitted the use of Sunday to carry them through and permit their petition to be accepted on the 91st day. The petitioner submits that there in in fact no difference between the *Union National Bank* case and the petitioner's in regard to the matter of time. Both were filed on the 91st day. However the Court in the *Union National Bank* case utilized Rule 6(a) of the Federal Rules of Civil Procedure, when in fact those Rules do not govern the United States Supreme Court. The Federal Rules of Civil Procedure govern only the United States District Courts.

Petitioner respectfully submits therefore, that the Court in the *Union National Bank*, liberally and leniently construed 2101(c) in order to avoid a proper cause of action from being subjected to technical limitations. The Court said so, when it cited *Street v. United States*, 133 U.S. 209. In the *Street* case the Court said in treating a Sunday as a *dies non* that,

> "The intent of Congress is obvious, and all proceedings to carry such intent into effect should be liberally construed and not subjected to any such technical limitations as will thwart such obvious purpose."

Yet it must be remembered that there was nothing the statute in the *Street* case that provided, as does Rule 6(a) of the Federal Rules of Civil Procedure, to treat a Sunday or legal holiday as a *dies non*. It was merely utilized for carrying out the intended purpose of Congress "to transfer army officers from active duty and to fill vacancies in the active list on or before January 1, 1871 . . ." To do otherwise would be to "thwart such obvious purpose."

The Court in the *Street* case would have taken the same position even if the 90th day had not been a Sunday; even if on the 90th day an innocent, inadvertent error had occurred, as it occurred in this case. The intent of Congress should not be thwarted by a technical limitation.

Indeed a reading of the legislative history concerning the enactment of Title 28, Sec. 2101(c) reveals nothing at all to show that Congress in changing the 3 months requirement to 90 days, meant anything other than the same three months. The real change in the statute was for the purpose of eliminating reference to the Supreme Court of the Philippine Islands - the Philippines having become an independent sovereign nation.

The matter in controversy rings with great injustice. The petitioner has suffered substantial harm at the hands of the respondent. To permit the latter to profit at the expense of the petitioner, would indeed be a most lamentable conclusion to this controversy. The respondent falsely, knowingly and maliciously utilized what he believed to be the secret channels of government to the injury the petitioner and then sought the protection of *Barr v. Matteo.*

It is most respectfully submitted that the matter is one which should provide the Court the opportunity to set a more definitive boundary against officials who, as Judge Hand stated in *Gregoire v. Biddle*, 177 F.2d 579 (Cir. 1949), cert. den. 339 U.S. 949 (1950), "exercise a power dishonestly" and thus "overstep its bounds."

The Supreme Court of the United States is therefore humbly requested not to deny this petition on the grounds of being out of time; that it construe the governing statute liberally and leniently to avoid thwarting the intent of Congress to give the petition his day in Court.

Respectfully submitted,

Samuel I. Sherwood
501 13th Street, N.W.
Washington, D.C.
Attorney for Petitioner

APPENDIX

AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

John K. Brewer, having been duly sworn, on oath deposes and says that: I reside at 8803 Trafalgar Court, Springfield, Va., and am production manager for Thiel Press, 1422 K Street, N.W., Washington, D.C.; that on June 28, 1971, Mr. Sherwood brought in a petition in rough for a Writ of Certiorari in Gordon v. Adcock; that we both agreed that the final date for filing was June 30, 1971, inasmuch as the date of judgment was March 30, 1971 from the U.S. Court of Appeals for the Ninth Circuit. We were both misled by the unfortunate March 30th date, both forgetting that March had 31 days as did May. The next day about noon, Mr. Sherwood phoned. He sounded terribly upset. He said that it had just crossed his mind that we had miscalculated and that the final filing date was the previous day —June 28th. It was just too bad because we could have still printed it on the previous day and it could have been filed on June 28th. Mr. Sherwood spent most of the afternoon of the 29th at our office in a terribly upset state waiting for the brief. As soon as it was ready he grabbed a taxi and raced for the court.

/s/ John K. Brewer

Subscribed and sworn to before me this 6th day of August, 1971.

/s/ Estelle Rubin
Notary Public, D.C.

AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

Rozina W. Bailey having been duly sworn, on oath deposes and says: That I reside at 616 North Piedment Street, Arlington, Va.; that I am assistant production manager for Thiel Press, 1422 K Street, N.W., Washington, D.C.; that on June 28, 1971, Mr. Sherwood brought in a petition in rough for a Writ of Certiorari in Gordon V. Adcock; my boss Mr. Brewer told me that the final date for filing was June 30. In the morning of the next day, June 29, Mr. Sherwood called in to say that he and Mr. Brewer had miscalculated the time and that the petition should have been filed the previous day June 28, and spent most of the afternoon awaiting the printing of the brief. He was extremely upset. As soon as the petition was ready, he grabbed a taxi and raced for the Court. It is too bad because the brief could have been filed the same day. It was just an unfortunate inadvertance and miscalculation mostly because the date of the judgment was on March 30, causing one to put the 90 day mark on the same date 3 months later.

/s/ Rozina W. Bailey

Subscribed and sworn to before me this 6th day of August, 1971.

/s/ Estelle Rubin
Notary Public, D.C.